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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Amendment of Parts 21 and 74 of the
Commission's Rules With Regard to
Filing Procedures in the Multipoint
Distribution Service and in the
Instructional Television Fixed Service

and

Implementation of Section 309(j) of the
Communications Act - Competitive Bidding

MM Docket No. 94-131

DOCKET FILE COPY ORIGINAL

PP Docket No. 93-253

To: The Commission

PETITION OF INSTRUCTIONAL TELECOMMUNICATIONS FOUNDATION, INC.
FOR PARTIAL RECONSIDERATION AND CLARIFICATION

Summary of Reconsideration and Clarification Sought

Instructional Telecommunications Foundation, Inc. (ITF) believes that the Report and Order in the above-captioned rulemaking¹ contains several features which are capable of seriously disrupting ITFS instructional service. Accordingly, by this Petition ITF asks the Commission to:

1. Delete the Report and Order provision which accords BTA winners a BTA-wide protected service area when BTA winners operate MMDS systems on ITFS channels.
2. Modify the Report and Order provision which accords BTA winners a BTA-wide protected service area on MMDS channels so that it remains possible to activate and improve ITFS facilities on Channels D-4 and the G channel group.
3. Delete the Report and Order provision which grants BTA winners rights of first refusal to lease ITFS capacity within the BTA.
4. State explicitly the nature of interference protection which BTA winners will be required to afford ITFS systems when the BTA winner applies for MMDS facilities on either MMDS or ITFS channels; specifically, ITF requests that the Commission define ITFS operators as incumbents, regardless of whether or not they have leased excess channel capacity

Hereinafter "Report and Order."

Background

ITF is licensee of seven stations in the Instructional Television Fixed Service (ITFS): WHR-509, Indianapolis; WHR-527, Philadelphia; WHR-512, Sacramento; WHR-511, Kansas City; WLX-699, Salt Lake City; WLX-816, Phoenix, and WLX-694, Las Vegas. These facilities provide instructional service to elementary and secondary schools in the metropolitan areas they serve. ITF serves both public and private schools. Our instructional programming covers a wide variety of curricular topics, including: art, biology, chemistry, earth science, economics, english literature, ethics, French, health education, history, mathematics, psychology, social studies, Spanish, and writing skills.

ITF leases excess channel capacity to wireless cable operators in a majority of these markets. These operators include: People's Choice TV (Indianapolis, Kansas City, and Phoenix); ACS Enterprises (Philadelphia); and Wireless Broadcasting Systems (Sacramento). Significantly, ITF has declined to lease excess capacity to a considerable number of would-be wireless cable operators, including at least one firm which was the object of federal regulatory action as a result of its "boiler room" fund-raising activities.

The choice of a wireless cable operator is very important to ITF, because our activities become intertwined. For example, wireless cable operators maintain ITF's transmission facilities on a day-to-day basis, subject to our supervision. Wireless cable operators also often provide personnel and equipment for playing back our instructional programming on videotape. Because a number of the wireless cable systems have built a substantial base of subscribers, they have created new and important audiences for our instructional offerings, leading us in one community to program through the summer months. A wireless cable operator often plays a significant role in publicizing and promoting the instructional programming carried on its system. Finally, excess capacity leasing is a source of significant income to ITF, and much of it is paid on the "honor system," since

* These ITFS systems are all operational, except for WLX-699.

the amounts are calculated according to the number of subscribers which is reported by the operator.

The quality of the wireless cable operator is thus central to a number of important aspects of ITF's activities, including some which affect our compliance with Commission rules. In order for us to enter into an excess capacity lease with a firm, we must believe it to be: stable; technically competent; adequately funded and staffed; honest; aware of the nature and importance of FCC Rule compliance; and supportive of education. ITF therefore conducts a significant amount of research into a wireless cable operator before agreeing to do business.

As well, however, the ability to run purely instructional ITFS operations is important to ITF. Our WHR-512 and WHR-509 both initiated service and operated for a substantial period of time without excess capacity leases; it is possible that at the expiration of current leases, some of ITF's facilities could return to instructional-only operation. Further, ITF notes that a number of ITFS licensees around the nation have made a conscious decision not to lease excess capacity. Many of these systems render highly meritorious instructional service, and ITF believes that it is important for the Commission to maintain policies that make it feasible to operate ITFS systems without excess capacity leasing.

I. Petition for Reconsideration.

A. BTA-Wide PSA for MMDS Facilities Operated on ITFS Channels.

Paragraph 41 of the Report and Order gives BTA winners sole eligibility to apply for MMDS facilities on ITFS channels pursuant to Sections 74.990 and 74.991 of the Commission's Rules, and accords such facilities BTA-wide protected service areas. The extent of the BTA winner's ITFS-channel PSA will have the effect of severely limiting the ability of educational entities to apply for new ITFS facilities and to improve existing ITFS transmission systems---even when the BTA-winner's facilities render minimal service.

Consider the case of Denver, a BTA which occupies most of northern Colorado, extending from the Utah to Kansas borders. Denver itself is served

by a full complement of ITFS systems occupying all 20 channels. Because of the heavy ITFS usage, Section 75.990(a) of the Commission's Rules bars the BTA winner from establishing MMDS facilities on ITFS channels within 50 miles of Denver. However, there would be little difficulty in obtaining licenses for MMDS stations at, say, Craig (Colorado), which is located in the northwestern corner of the state more than 150 miles from Denver.

No matter how limited or isolated the actual signal coverage of the MMDS facility, the policy enunciated in the Report and Order will allow the BTA winner to block further ITFS development on both the affected channel group and all adjacencies throughout the entire BTA. In the case of a Craig, Colorado MMDS facility, this preclusion would extend more than 300 miles, across the signal barrier created by the continental divide, to an ITFS applicant in the eastern Colorado plains town of Burlington, because Burlington too is located within the Denver BTA. A single B-channel application filed in Craig could preclude all new applications for ITFS facilities in the Denver BTA on the following nine ITFS channels: A-1 through A-4, B-1 through B-4, and D-1. Applications for both the B and C channel groups would affect all 16 frequencies in the A, B, C, and D channel groups.

While these perverse effects are most obvious in the western United States, they are in fact a nationwide problem because there are many large BTAs. The New York City BTA includes territory from the eastern tip of Long Island to the northwestern portion of New Jersey, a distance of more than 150 miles. The Bangor, Maine BTA extends approximately 200 miles from end to end. The most distant parts of the Des Moines BTA are separated by approximately 160 miles. In the case of the Los Angeles BTA, the most distant portions are more than 350 miles apart.

Building isolated MMDS facilities on ITFS channels would have strong preclusive effects without gaining the BTA winner signal coverage of significant populations. ITF submits that the highly destructive results of the Commission's PSA policy on ITFS service are not justified in light of the limited direct benefits which would accrue to BTA winners. We strongly urge that the Commission accord PSA protection only to such MMDS stations as the

FCC actually authorizes under Section 74.990, and limit the extent of the PSA to a 35-mile radius.

B. BTA-Wide PSA for MMDS Facilities Operating on the E, F, and H Channel Groups.

Under the Report and Order, BTA winners will be granted BTA-wide protected service areas for the E, F, and H MMDS channel groups, subject to the prior rights of incumbents.⁴ All of these channel groups are adjacent to ITFS frequencies: Channel E-1 is first-adjacent to Channel D-4; Channel F-4 is first-adjacent to Channel G-1; and the H group has first adjacencies with all four G-group channels.

Evidently, the BTA winner will be accorded these PSA privileges even if it is unable to construct facilities in the BTA due to the rights of incumbents, or if it otherwise fails to construct MMDS stations.

The effect of this wide-ranging PSA protection is the de facto reallocation of five of 20 ITFS channels, since educational entities will be able to construct no new ITFS facilities without the consent of the BTA winner. Further, the ability of existing ITFS licensees to improve their signal coverage will be circumscribed by the limitations of their existing protected service areas.

ITF believes that the Commission probably intends no such wholesale changes in the nature and extent of ITFS service---and that if it does, it should initiate an entirely new rulemaking which gives parties the opportunity to comment on this profound development.

Instead of this destructive policy, ITF submits that BTA winners should be entitled to 35-mile PSA protection with respect to new and modified ITFS facilities only with respect to those MMDS stations which the Commission

⁴ If BTA winners in neighboring BTAs both operate MMDS stations on ITFS channels, the PSA of each should extend to the BTA boundary or such other demarcation point upon which the BTA winners agree.

⁵ Report and Order, paragraphs 39 and 40.

⁶ It is arguable that existing ITFS stations which have not leased excess capacity will be denied the ability to change sites or increase power at all, given that they have no current PSAs.

authorizes them to construct. Under these circumstances, it will remain possible to build new ITFS facilities on channels D-4, G-1, G-2, G-3, and G-4 in areas where the BTA winner has not sought to build MMDS stations, or has been unable to gain authorization for them.

ITF also asks that the Commission consider the devastating cumulative effect on ITFS of its policies concerning BTA-wide PSA protection for MMDS facilities built on ITFS channels combined with the rights accorded to BTA winners for the E, F, and H channel groups. If a single BTA winner is able to secure authorization for MMDS stations on the B and C channel groups, it will have obtained veto power over all 20 ITFS channels within the BTA boundaries, including the ability to block the inauguration of new service completely. Such rights extend far beyond what is needed to facilitate the growth of MMDS service in the 2.5 GHz band; the BTA winner will enjoy little benefit from PSA protection beyond 35 miles except to exercise leverage over educational entities seeking to inaugurate or improve ITFS service.

C. Right of First Refusal to Lease Excess ITFS Channel Capacity.

In the Report and Order, the Commission creates a system by which the BTA winner is given a right of first refusal with respect to leasing excess ITFS capacity within its BTA.⁶ ITF believes that such an arrangement is not in the public interest.

First of all, granting the BTA winner a right of first refusal removes from ITFS licensees the ability to refuse to lease excess capacity to firms which they judge to be unqualified for reasons of character or competence. If an ITFS entity does not wish to lease to an undesirable BTA winner, its only recourse is to cease leasing excess capacity at all.

Secondly, the nature of ITFS leasing negotiations will change as a result of the right of first refusal, such that they focus much more on financial compensation and much less on mutually beneficial arrangements which promote education.

Consider the following example, which is hypothetical but in our

⁶ Paragraph 41.

experience quite plausible.

An ITFS licensee has the opportunity to lease excess capacity to Company A, an established wireless cable operator which is not the BTA winner but has a substantial portfolio of leases with incumbent licensees and a large number of residential customers. It is a stable firm which has created a consortium of educational providers and services which the operator promotes as part of its wireless cable service. Because of these factors, the ITFS licensee does not seek "top dollar" for its excess capacity, but rather seeks a balanced package of financial compensation and wireless cable support of its instructional service.

Company B wins the BTA, which is highly encumbered and thus did not attract many bidders. Company B is an enterprise with no track record, technical staff, or subscriber base. It was able to win the bidding with funds it obtained as a "boiler room" operation selling general partnership interests, and as a small business it had comparatively low initial cash

In ITF's experience, and in that of the principal wireless cable trade association, "boiler room" operations have presented a widespread problem. Consider the following excerpt from an interview with Robert L. Schmidt, president of the Wireless Cable Association International, in the July, 1995 edition of Private Cable and Wireless Cable magazine (p.18):

[Q.] The wireless industry has experienced image problems due to the boiler room, marketing scams which have been prevalent during the last couple of years. Do you think this scam problem is subsiding?

[A.] Have you ever been in the inner city when you see large rats running around under the cover of darkness? Once there's light, the rats go away.

In a way, because of the vigilance of the Association to a great extent, the law enforcement people have put a big, bright light on this issue. And I predict the rats (will) go away, because the rats have to go someplace where it's easy pickings...

The low-life that makes up these groups---who have used small investors and double talked them into get-rich scams---will find a new day someplace else.

The burden of Mr. Schmidt's remarks appears to be that law enforcement efforts will not eliminate the scamsters which have preyed upon both the public and ITFS licensees, but simply will drive them into new fields. ITF submits that there is no guarantee that such companies will not find a new bonanza in recruiting investors to purchase rights to (often impaired) BTA spectrum.

requirements.⁸ While Company B is able to meet its initial payments to the Commission, its principals have drained almost all of the remaining cash out of the firm as "marketing" expenses. Company B exercises its right of first refusal, obtaining ITFS excess capacity a windfall rate due to the fact that the ITFS licensee did not seek "top dollar" in its dealings with Company A. However, Company B is not able to properly maintain transmission equipment in keeping with FCC rules, has no base of subscribers, and has neither the interest nor the ability to promote education as part of its activities.

Of course, the mere existence of the right of first refusal would change the dynamics of the above example. First, there is a substantial probability that the ITFS licensee would have to refrain from leasing altogether due to the risk that its excess capacity would fall into the hands of an unscrupulous BTA winner. And, secondly, if it did negotiate an excess capacity lease, the licensee would be more likely to forego mutually beneficial educational arrangements and rely instead upon large fixed cash payments.

The creation of disincentives for ITFS excess capacity leasing is ironic, in light of the fact that the Commission has identified its goal as "accumulating a full complement of channels" for wireless cable purposes.⁹

ITF points out that in most markets with functioning wireless cable systems, it was necessary for the operator to lease a large amount of ITFS channel capacity in order to go into business. Although we had limited time to research the matter, ITF gathered the following data with respect to communities where we have ITFS facilities:

⁸ ITF is not here asking that the Commission revisit the preferences it has accorded small businesses. We merely point out that such preferences may lead to unintended consequences with respect to some BTA winners' leasing ITFS excess channel capacity unless the Commission eliminates the right of first refusal.

⁹ Report and Order, paragraph 41.

<u>Metropolitan Area</u>	<u>Wireless Cable Operator</u>	<u>Number of ITFS Channels Under Contract</u> ¹³
Indianapolis	Wirless Cable of Indianapolis ¹¹	20
Kansas City	People's Choice TV	12
Philadelphia	ACS Enterprises	18
Phoenix	People's Choice TV	20

Under the circumstances illustrated by the above markets---and many others---the Commission's rationale for granting BTA winners a right of first refusal is not rational. To the degree that it disturbs the ability of current lessees to renew their leases, the policy will have the effect of disaggregating channels. To the degree that it does not, it will not help BTA winners accumulate a channel complement.

Finally, ITF notes that a number of commenters are arguing to the Commission that the right of first refusal policy is unconstitutional, violative of the Administrative Procedures Act because of the fact that it was adopted without the opportunity for public comment, or otherwise illegal. While ITF has not yet had the chance to fully research those arguments, they appear to have merit. We believe, however, that policy arguments alone are sufficient to warrant reconsideration---and elimination---of the provision.

II. Petition for Clarification.

Inclusion of ITFS Licensees Within the Definition of an "Incumbent".

In the Report and Order, the Commission sets out the interference rights of "incumbents" and revises their protected service areas. In paragraph 3, the Commission describes incumbents as only MDS and/or MMDS licensees:

...the rules we adopt require BTA authorization holders to honor the protected service areas of incumbent MDS operators within their BTAs. [Emphasis added.] In a companion order, also adopted today, the Commission expanded the protected service areas of existing MDS stations. [Emphasis added; footnote omitted.] These various licensees and applicants that are authorized or proposed on or before June 15, 1995, including those stations that are subsequently modified, renewed or reinstated, are referred to throughout this Report and Order as "authorized or previously proposed facilities" or "incumbents."

¹¹ Sources: People's Choice TV and ACS Enterprises.

¹³ Wireless Cable of Indianapolis is principally owned by People's Choice TV.

Paragraphs 39 and 40 of the Report and Order state that BTA winners will have to protect ITFS stations when they submit MMDS applications, but do not explicitly set forth the standards for such protection.

ITF hereby petitions the Commission to clarify that ITFS licensees too will be considered incumbents, regardless of whether they have leased excess channel capacity. Specifically, ITF asks that the Commission clarify:

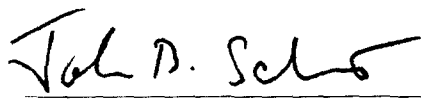
1. That if the ITFS licensee has leased excess capacity, then with respect to a BTA winner's MMDS applications the ITFS entity is entitled to a full 35-mile protected service area radius;¹⁰ and
2. That an ITFS licensee which has not leased excess capacity is entitled to interference protection with respect to a BTA winner's MMDS applications in the manner currently set forth in Section 74.903(a) of the Rules.

ITF believes that Commission should take pains to set these matters forth clearly and in detail. To the degree that such standards are unclear, they will lead to numerous disputes and strain the Commission's staff resources.

For the foregoing reasons, the above-captioned rulemaking should be partly reconsidered and clarified.

Respectfully submitted,

INSTRUCTIONAL TELECOMMUNICATIONS
FOUNDATION, INC.

By: 
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Dated: August 9, 1995

¹⁰ ITF recognizes that ITFS protected service areas already have been expanded to 35 miles, in that ITFS Rule Section 74.903(d) refers to "a protected service area as defined at [Section] 21.902(d)," and 21.902(d) was modified in the above-captioned rulemaking to specify a 35 mile radius. However, this ITFS rule provision does not specifically address incumbency vis a vis BTA winners.